

§ 800.13 Post-review discoveries.

(a) *Planning for subsequent discoveries*—(1) *Using a Programmatic Agreement.* An Agency Official may develop a Programmatic Agreement pursuant to § 800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.

(2) *Using agreement documents.* When the Agency Official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no Programmatic Agreement has been developed pursuant to § 800.13(a)(1), the Agency Official shall include in any finding of no adverse effect or Memorandum of Agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the Agency Official's responsibilities under section 106 and this part.

(b) *Discoveries without prior planning.* If historic properties are discovered or unanticipated effects on historic properties found after the Agency Official has completed the section 106 process without establishing a process under § 800.13(a), the Agency Official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the Agency Official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or

(2) If the Agency Official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archaeological data, the Agency Official may comply with the Archaeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the Agency Official has approved the undertaking and construction has commenced, determine actions that the Agency Official can take

to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery. The notification shall describe the actions proposed by the Agency Official to resolve the adverse effects. The SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification and the Agency Official shall take into account their recommendations and carry out appropriate actions. The Agency Official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

(c) *Eligibility of properties.* The Agency Official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of Section 106. The Agency Official shall specify the National Register Criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) *Discoveries on tribal lands.* If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the Agency Official has completed the section 106 process without establishing a process under § 800.13(a) and construction has commenced, the Agency Official shall comply with applicable tribal regulations and procedures and obtain the concurrence of the Indian tribe on the proposed action.

Subpart C—Program Alternatives**§ 800.14 Federal agency program alternatives.**

(a) *Alternate procedures.* An Agency Official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the Act.

(1) *Development of procedures.* The Agency Official shall consult with the Council, the National Conference of State Historic Preservation Officers or

individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in § 800.14(f), in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the FEDERAL REGISTER and take other appropriate steps to seek public input during the development of alternate procedures.

(2) *Council review.* The Agency Official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the Agency Official and the Agency Official may adopt them as final alternate procedures.

(3) *Notice.* The Agency Official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the FEDERAL REGISTER.

(4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the Act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) *Programmatic Agreements.* The Council and the Agency Official may negotiate a Programmatic Agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) *Use of Programmatic Agreements.* A Programmatic Agreement may be used:

(i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

(v) Where other circumstances warrant a departure from the normal section 106 process.

(2) *Developing Programmatic Agreements for agency programs—(i) Consultation.* The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCHSPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the Programmatic Agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Agency Official shall also follow § 800.14(f).

(ii) *Public Participation.* The Agency Official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The Agency Official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.

(iii) *Effect.* The Programmatic Agreement shall take effect when executed by the Council, the Agency Official and the appropriate SHPOs/THPOs when the Programmatic Agreement concerns a specific region or the President of NCSHPO when NCSHPO has participated in the consultation. A Programmatic Agreement shall take effect on tribal lands only when the THPO, Indian tribe or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved Programmatic Agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the President of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only

terminate the application of a regional Programmatic Agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the Act and the SHPO is signatory to Programmatic Agreement, the THPO assumes the role of a signatory, including the right to terminate a regional Programmatic Agreement on lands under the jurisdiction of the tribe.

(iv) *Notice.* The Agency Official shall notify the parties with which it has consulted that a Programmatic Agreement has been executed under this subsection, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) *Terms not carried out or termination.* If the Council determines that the terms of a Programmatic Agreement are not being carried out, or if such an agreement is terminated, the Agency Official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

(3) *Developing Programmatic Agreements for complex or multiple undertakings.* Consultation to develop a Programmatic Agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow §800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the Agency Official shall comply with the provisions of subpart B of this part for each individual undertaking.

(c) *Exempted categories—(1) Criteria for establishing.* An Agency Official may propose a program or category of agency undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as “undertakings” as defined in §800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

(iii) Exemption of the program or category is consistent with the purpose of the Act.

(2) *Public participation.* The Agency Official shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The Agency Official shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The Agency Official shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the exempted program or category of undertakings has the potential to affect historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the Agency Official set forth in §800.14(f).

(5) *Council review of proposed exemptions.* The Council shall review a request for an exemption that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of §800.14(c)(1) have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the public. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt. The decision shall be based on the consistency of the exemption with the purposes of the Act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the Act.

(6) *Legal consequences.* Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the Agency Official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) *Termination.* The Council may terminate an exemption at the request of the Agency Official or when the Council determines that the exemption no longer meets the criteria of §800.14(c)(1). The Council shall notify the Agency Official 30 days before termination becomes effective.

(8) *Notice.* The Agency Official shall publish notice of any approved exemption in the FEDERAL REGISTER.

(d) *Standard treatments—(1) Establishment.* The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category or effects on historic properties to assist Federal agencies in satisfying the requirements of subpart B of this part. The Council shall publish notice of standard treatments in the FEDERAL REGISTER.

(2) *Public participation.* The Council shall arrange for public participation appropriate to the subject matter and the scope of the standard treatment and consistent with subpart A of this part. The Council shall consider the nature of the standard treatment and its likely effects on historic properties and the individuals, organizations and entities likely to be interests. Where an Agency Official has proposed a standard treatment, the Council may request the Agency Official to arrange for public involvement.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed standard treatment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the proposed standard treatment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the Agency Official set forth in §800.14(f).

(5) *Termination.* The Council may terminate a standard treatment by publication of notice in the FEDERAL REGISTER 30 days before the termination takes effect.

(e) *Program comments.* An Agency Official may request the Council to comment on a category of undertakings in

lieu of conducting individual reviews under §§800.4 through 800.6. The Council may provide program comments at its own initiative.

(1) *Agency request.* The Agency Official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the Agency Official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) *Public participation.* The Agency Official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standard in subpart A of this part. The Agency Official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the Agency Official set forth in §800.14(f).

(5) *Council action.* Unless the Council requests additional documentation, notifies the Agency Official that it will decline to comment, or obtains the consent of the Agency Official to extend the period for providing comment, the Council shall comment to the Agency Official within 45 days of the request.

(i) If the Council comments, the Agency Official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the FEDERAL REGISTER of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

(ii) If the Council declines to comment, the Agency Official shall continue to comply with the requirements

of §§800.3 through 800.6 for the individual undertakings.

(6) *Withdrawal of comment.* If the Council determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council may withdraw the comment and the Agency Official shall comply with the requirements of §§800.3 through 800.6 for the individual undertakings.

(f) *Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.* Whenever an Agency Official proposes a program alternative pursuant to §800.14 (a)–(e), the Agency Official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) *Identifying affected Indian tribes and Native Hawaiian organizations.* If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the Agency Official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the Agency Official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them.

(2) *Results of consultation.* The Agency Official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The Agency Official and the Council shall take those views into account in reaching a final decision on the proposed program alternative.

§800.15 Tribal, State, and Local Program Alternatives. [Reserved]

§800.16 Definitions.

(a) *Act* means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470–470w–6.

(b) *Agency* means agency as defined in 5 U.S.C. 551.

(c) *Approval of the expenditure of funds* means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects cause by the undertaking.

(e) *Comment* means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) *Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.

(g) *Council* means the Advisory Council on historic Preservation or a Council member or employee designated to act for the Council.

(h) *Day* or *days* means calendar days.

(i) *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) *Foreclosure* means an action taken by an Agency Official that effectively precludes the Council from providing comments which the Agency Official